(26)

No. 04-1152

Supreme Court, U.S.
FILED
SEP 21 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DONALD RUMSFELD, et al.,

Petitioners,

v.

FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR COLUMBIA UNIVERSITY, CORNELL UNIVERSITY, HARVARD UNIVERSITY, NEW YORK UNIVERSITY, THE UNIVERSITY OF CHICAGO, THE UNIVERSITY OF PENNSYLVANIA, AND YALE UNIVERSITY AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICI[1]

Columbia University, Cornell University, Harvard University, New York University, the University of Chicago, the University of Pennsylvania, and Yale University are all private universities that are committed to the interrelated

[1] No counsel for a party authored any part of this brief. No person or entity other than the *amici*, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. We note that New York University School of Law is a member of respondent FAIR. The written consent of all parties to the filing of this brief has been filed with the Clerk of this Court.

goals of providing the best possible education for their students and leading the world in groundbreaking scientific and medical research.[2] Each receives many millions of dollars of federal funding every year, a large portion of which is used to sponsor and conduct basic research.

Amici recognize that federal grants and contracts necessarily come with a series of conditions that relate to the use of the federal funds. It is essential, however, to the continued vitality of private research universities—to their success both in educating their students and in serving as centers of innovation and discovery—that this Court recognize reasonable limits on the ability of the federal government to use the coercive power of massive research funding to intrude on academic freedom.

In this case, the United States takes an exceedingly narrow view of the First Amendment limits on the government's ability to impose conditions on research grants and contracts provided to private universities. It also suggests that, if a private university does not like any such conditions, it can simply decline to accept federal funding. U.S. Br. 16. *Amici* strongly disagree on both counts. They submit this brief to explain why the government's articulation of the relevant legal standard is incorrect and why private research universities like *amici* cannot simply reject federal funding without imperiling their very nature.

SUMMARY OF ARGUMENT

The United States defends the Solomon Amendment in part on the argument that conditions on receipt of federal funding violate the First Amendment "only when Congress aims 'at the suppression of dangerous ideas.'" U.S. Br. 41 (quoting *National Endowment for the Arts* v. *Finley*, 524 U.S. 569, 587 (1998)). That position is incorrect as a matter

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[2] Cornell University is a private research university and also the land-grant university for the State of New York.

of law, and, if adopted by this Court, would threaten grave damage to the nation's institutions of higher education.

The government's position fundamentally misapprehends the scope of the unconstitutional conditions doctrine. At a minimum, this Court's decisions and fundamental First Amendment principles plainly render constitutionally suspect any funding condition that coerces compliance, that intrudes on a university's academic freedom, and that does not relate to the purpose of the grant.

The government also incorrectly presumes that universities that do not wish to comply with funding conditions may simply decline federal assistance. In fact, rejection of federal funds is not a real choice for modern research universities. Such institutions primarily engage in basic research, which is conducted without the goal—and therefore must be funded without the promise—of developing specific marketable products. Only the federal government has the financial incentives and resources necessary to fund such high-risk, long-term research. As a result, federal assistance supplies roughly 60% of university research expenditures. In addition, the partnership between federal funding and basic university research has yielded profound benefits to society, driving major portions of the national economy and supporting military preparedness. Universities, therefore, cannot decline federal funding without fundamentally altering their character and dismantling a significant component of the nation's research and development infrastructure.

Because research universities must accept federal funding, intrusive conditions on that funding would undermine the vital interest in academic freedom. This Court has long recognized that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian* v. *Board of Regents of the University of the State of New York*, 385 U.S. 589, 603 (1967). Decisions of this Court confirm that academic freedom extends beyond the classroom setting to include institutional choices that "shape [the university's] educational character and mission." *Widmar* v.

Vincent, 454 U.S. 263, 277–279 & n.2 (1981) (Stevens, J. concurring in the judgment); *Grutter* v. *Bollinger*, 539 U.S. 306, 328–329 (2003). Such decisions also emphasize the importance of judicial deference to the university's views of how best to shape its educational atmosphere and to advance its mission. These principles are based on the central role that universities perform in a democratic society, furthering First Amendment values by creating a teaching environment that is not skewed by government constraints.

Viewed in context, there can be little doubt that the Solomon Amendment leaves universities with no choice but to comply—that the law is a command rather than an inducement—and that the conditions it imposes on receipt of a broad array of federal grants and contracts bear no relationship to that funding. Moreover, the law, at least as construed by the government, intrudes on the academic freedom of covered schools more than necessary to serve any interest in recruiting. The Solomon Amendment, for example, does not merely require universities to grant the military fully adequate access to their campuses and students. Rather, it requires that universities receiving federal funds provide military recruiters with access that is "at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983. This "equal" treatment rule was intended to prevent universities from "send[ing] a message"—presumably to their students—that is critical of military hiring policy. *FAIR* v. *Rumsfeld*, 390 F.3d 219, 227-228 (3d Cir. 2004).

Whether or not a particular school would choose to deliver such a message, the government's contention that it may use the coercive power of federal funding to prevent a school from doing so should be rejected.

ARGUMENT

Under the Solomon Amendment, a university that does not allow military recruiters access to its student body on terms identical to those afforded other employers must be denied all funds from a broad range of federal agencies. 10

U.S.C. § 983. While *amici* support the military and recognize that a strong relationship between universities and the military is essential to the nation's security, *amici* believe that the government may not encumber the terms of that relationship through unconstitutional restrictions on university research funding.

Amici disagree with, and submit this brief in response to, the position of the United States regarding the scope of the unconstitutional conditions doctrine in the context of higher education. The brief for the United States contends that the First Amendment limits on Congress' Spending Clause power are exceeded, "and the doctrine of unconstitutional conditions is implicated[,] *only* when Congress aims 'at the suppression of dangerous ideas.'" U.S. Br. 41 (quot-*Finley*, 524 U.S. at 587) (emphasis added). Thus, according to the United States, Congress may validly condition acceptance of federal research funds on a private university's compliance with government directives short of those that target "dangerous" speech. If a private university "does not wish to be bound by a funding condition," the government contends, it is free "to decline federal assistance." U.S. Br. 41.

In advancing this argument, the government simply ignores the debilitating consequences to research universities and, more generally, to scientific progress in the United States that such a choice would entail; it fails to heed this Court's repeated admonition that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools," *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960); and it fundamentally misconceives the scope of the unconstitutional conditions doctrine. The government's position is incorrect as a matter of law and, if adopted by this Court, would threaten grave damage to the integrity and independence of the nation's universities.

I. THE CONSTITUTION PROHIBITS CONDITIONS ON FEDERAL FUNDING THAT UNDERMINE ACADEMIC FREEDOM AT THE NATION'S UNIVERSITIES

Decisions of this Court refute the government's unduly narrow view of the unconstitutional conditions doctrine—particularly where, as here, vital First Amendment interests are at stake. Under that doctrine, "even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely." *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972). Most notably, "[i]t may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Id.* If a condition imposed on conferral of an important government benefit "necessarily will have the effect of coercing the claimants to refrain from" activity protected by the First Amendment, that condition cannot stand. *Speiser* v. *Randall*, 357 U.S. 513, 519 (1958). Otherwise, "constitutional guaranties, so carefully safeguarded against direct assault," would be left "open to destruction by the indirect, but no less effective, process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion." *Frost* v. *Railroad Comm'n*, 271 U.S. 583, 593 (1926).[3]

Conditions on government assistance are subject to particularly stringent scrutiny when they implicate the academic freedom of universities. As this Court observed in *Keyishian* v. *Board of Regents of the University of the State*

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[3] The reliance of the United States on the Spending Clause as a source of Congress' authority to impose "criteria for the receipt of federal funding" (U.S. Br. 40), is a red herring, especially as applied to private funding recipients. The question is not whether Congress possesses a constitutional font of power to legislate, or whether Congress has adhered to the principles (such as fair notice) that apply to conditions on funds received by *States*, *cf. South Dakota* v. *Dole*, 483 U.S. 203 (1987), but whether it has exercised that power in a manner that exceeds First Amendment limits.

of New York, 385 U.S. 589 (1967), academic freedom directly furthers core First Amendment interests because the "[n]ation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Id.* at 603 (internal quotation marks omitted). "Precision of regulation," the Court reasoned, "must be the touchstone in an area so closely touching our most precious freedoms." *Id.* at 603-604 (internal quotation marks omitted). This same rigorous approach controls where the government acts through conditions on funding rather than direct regulation. Thus, in *Rust* v. *Sullivan*, 500 U.S. 173 (1991), the Court observed that "the university is a traditional sphere of free expression so fundamental to the functioning of our society that the government's ability to control speech within that sphere by means of conditions attached to the expenditure of government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment." *Id.* at 200.

The type of funding conditions that the government's position in this case would allow cannot be squared with these principles. Under the rule the government advocates, it could control a university's curriculum by conditioning receipt of federal funds for developing a new laser on the university's agreement to teach Greek and Latin in addition to its other language offerings. The government could condition the receipt of hundreds of millions of dollars of research funding across all fields of study at the university on the school's willingness to admit particular students or to hire particular faculty members, regardless of their academic qualifications. Or, by the government's reasoning, Congress might use the hook of federal funding to require private universities to begin each class during hiring season by informing students of when and where military recruiters will be available for interviews. Because these conditions would not target "dangerous ideas," in the government's view they would present no constitutional problem. Plainly, however, such conditions would undermine both the principle of aca-

demic freedom and the First Amendment values that principle serves.

The government bases its constricted view of the unconstitutional conditions doctrine primarily on *Finley*, but the language on which the government relies—that "in the provision of subsidies, the government may not aim at the suppression of dangerous ideas," 524 U.S. at 587 (internal quotation marks and alteration omitted)—did not purport to declare that the government exceeds constitutional bounds *only* in such a situation. To the contrary, the Court simply addressed the narrow question whether "the Government may allocate competitive funding according to criteria that would be impermissible were direct regulation of speech or a criminal penalty at stake" and concluded that, with limited exception, the government may choose to fund one activity over another based on which activity it believes better serves the public interest. *Id.* at 587-588. Nothing in the *Finley* decision purported to rethink the unconstitutional conditions doctrine, nor did the Court have any reason to address the separate question, at issue here, whether the government may use the threat of the denial of a benefit as a means of coercing the recipient to modify constitutionally-protected activity.

Indeed, in several of the cases on which the government relies, *see Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533 (2001); *Rosenberger* v. *Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); *FCC* v. *League of Women Voters*, 468 U.S. 364 (1984), this Court stressed that the government's power to condition the receipt of federal funds is particularly limited where the effect of that action is to "distort [the] usual functioning," or interfere with the "accepted usage," of a traditional forum for expression. *Velazquez*, 531 U.S. at 543. That principle underlies this Court's recognition in *Rust* that conditions on funding of universities—"a traditional sphere of free expression . . . fundamental to the functioning of our society" 500 U.S. at 200—is subject to uniquely rigorous scrutiny. *See supra*, at 7.

Without defining the outer boundaries of the unconstitutional conditions doctrine, *amici* submit that this Court's decisions and fundamental First Amendment principles plainly render constitutionally suspect any funding condition that coerces compliance, that intrudes on academic freedom, and that does not relate to the purpose of the grant. In his concurring opinion in *Sweezy* v. *New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring in the result), Justice Frankfurter defined "academic freedom" as "the exclusion of governmental intervention in the intellectual life of a university." That ideal has limits, and generally is not implicated where the government (quite appropriately) imposes conditions that are reasonably related to the grant at issue and that do not transgress other First Amendment values. But, given the pervasiveness of federal funding of university-level research and education today, the concept of academic freedom would suffer a mortal wound if the government could use the enormous power of federal funding to impose conditions that lack a sufficient nexus to the relevant grants and interfere with the "intellectual life of [the] university." As one commentator observed over a quarter-century ago:

> There is no constitutional duty upon the government to subsidize education. But once the government decides to provide aid, it may not condition receipt of that aid upon surrender of the schools' First Amendment rights without a convincing showing of a clear nexus between the imposition of the condition and the effectiveness of the program itself.... Moreover, because free speech and associational interests of universities are so frequently implicated in federal grants to education, any condition must be measured by an exacting standard.

Philip A. Lacovara, *How Far Can the Federal Camel Slip Under the Academic Tent?*, 4 J. Coll. Univ. L. 223, 237 (1977) (footnote omitted).

As explained in Part II, *infra*, at 11-16, federal funding has become indispensable to the character and mission of private research universities. Without such funding, private universities could not conduct much of the innovative research on which society has come to depend, nor could they continue to attract the very best scientists to train the next generation of graduates. Universities therefore have no real choice but to obey the government's conditions; rejection is not a feasible option.

Yet, as explained in Part III, *infra*, at 16-20, the choice of accepting "governmental intervention in the intellectual life of a university" is also untenable. Although the Solomon Amendment may not allow the government directly to dictate what is taught in the classroom, Justice Frankfurter's admonition in *Sweezy* bears repeating: "[I]nroads on legitimacy must be resisted at their incipiency" because "unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure." 354 U.S. at 263-264 (Frankfurter, J., concurring in the result) (internal quotation marks omitted). Any inroad on the ability of universities to determine how best to educate their students and "to provide that atmosphere which is most conducive to" intellectual growth poses a grave threat to the First Amendment. *Id.* at 263 (internal quotation marks omitted).

Finally, as explained in Part IV, *infra*, at 20-24, respondents have argued that the Solomon Amendment intrudes on the ability of universities to shape the atmosphere in which they teach. Indeed, the Solomon Amendment itself is confirmation of the expressive quality of a university's recruiting decisions. Congress amended that enactment in 2004 to require not simply fully adequate access for military recruiters, but access on terms "at least equal in quality and scope" to the treatment afforded other employers. 10 U.S.C. § 983(b). That expansive application of the law is necessary, according to the Department of Defense, because anything less than identical access "sends the message" that the university disapproves of certain aspects of military policy.

FAIR v. *Rumsfeld*, 390 F.3d 219, 227–228 (3d Cir. 2004). Thus, the Department of Defense itself views the Solomon Amendment as a means of limiting expression in the academic environment.

II. Federal Funding Of Academic Research Is Critical To The Mission Of Private Universities And To The Nation's Economy And Security

"Federally supported university-based research is a critically important investment by the nation in its future prosperity and wellbeing." Nat'l Science and Technology Council, *Renewing the Federal Government-University Research Partnership for the 21st Century* 333 (Washington, DC: Office of Science and Technology Policy, April 1999). Since the end of World War II, such research has formed a central component of the nation's larger research and development enterprise, creating vast improvements in "the health, security, and quality of life of our citizens." *Id.* at 336. The partnership between the federal government and private universities has proved "vital to each." *Id.* at 331. Its fundamental alteration, through the federal government's attachment of funding conditions inconsistent with academic freedom, would be highly detrimental to both.

A. The Type of Research Conducted at Private Universities Depends Largely on Federal Funding and Could Not Be Performed Without It

Universities occupy a critical role as the nation's "prime repository of core competency in basic research." Nat'l Science and Technology Council, *supra*, at 333. Basic research, as distinct from applied research, focuses on increasing knowledge and understanding of observable phenomena at a fundamental level, without regard to the practical and concrete application of that knowledge. Universities are the largest performer of basic research in the United States, accounting for more than half of the national total. National Science Board, *Science and Engineering Indicators - 2004*, at 5-8. And for the most part, "university research is 'basic' research." Nathan Rosenberg & Richard R. Nelson, *Ameri-*

can Universities and Technical Advance in History, Research Policy 23:340 (1994). Roughly 75% of the research conducted at academic institutions falls within that category. National Science Board, *Science and Engineering Indicators - 2004*, at 5-5.

The character and focus of basic research render it both uniquely suited to the university setting and uniquely dependent upon robust federal funding. Such research yields profound benefits to society, industry, and government, *see infra*, at 12–15, but the nature and application of those benefits are difficult to predict. Because the product of basic research is "often published in scientific journals and shared among colleagues, it cannot be owned the way someone might own a patent." Federation of American Societies for Experimental Biology, *The Benefits of Biomedical Research, available at* http://www.faseb.org/opa/benefits/. As a result, "[i]t is generally not possible for the benefits of basic research to be captured only by the scientists and institutions that conduct it." *Id.* In addition, there is an inherent time lag between initiation of basic research and commercial application of its results—often as long as 20 years. James D. Adams, *Fundamental Stocks of Knowledge and Productivity Growth*, Journal of Political Economy 98(4): 676 (1990).

Thus, "[u]niversities, in their unending, unadulterated search to know, are uniquely situated to undertake such long-term research without worrying about its commercial application and payoff—a luxury that profit-seeking private industrial firms cannot afford." Richard C. Levin, *The Work of the University* 90 (2003). For the same reasons, only the federal government has the incentive and resources to provide the sustained financial support necessary to conduct that long-term, high-risk research. Donna Fossum et al., *Vital Assets: Federal Investment in Research and Development at the Nation's Universities and Colleges* 6 (RAND Corp. 2004). Were such support to cease, industry funds, which currently supply only 7% of academic research expenditures, would not and could not fill the void. National Science Board, *Science and Engineering Indicators - 2004*, at 5-

12. "If left totally to market forces, basic research would be underfunded since the gains from basic research are shared and the profits may not be captured by private investors." Federation of American Societies for Experimental Biology, *supra*.

Federal funds therefore support close to 60% of basic research conducted at America's universities. National Science Board, *Science and Engineering Indicators - 2004*, at 5-12. With almost two-thirds of support for such research coming from federal sources, universities are in no position simply to decline such funds if the government imposes intrusive conditions on their receipt. The premise of the government's unconstitutional conditions argument is thus fundamentally mistaken; conditioning acceptance of federal funds on compliance with governmental directives is tantamount in this context to direct regulation. A decision by this Court based on the government's position—upholding any conditions on receipt of federal research funds short of those targeted at "dangerous ideas"—would therefore pose grave risks to the institutional autonomy and academic freedom so central to the university's mission. *See infra*, at 16-20.

B. The Research Partnership Between The Federal Government And Private Universities Is Essential To The Nation's Security And Prosperity

The nation's long-term interest plainly lies in continued federal funding on terms that simultaneously promote basic research and respect academic freedom. By any relevant measure, the unencumbered provision of federal funds for university research has been "exceptionally productive." Nat'l Science and Technology Council, *supra*, at 331. The results of that partnership are ubiquitous and indispensable; they touch almost every factor of modern life. The computer on which this brief was written is a descendant of the Whirlwind, the world's first high-speed, general purpose, electronic digital computer, which was developed at MIT with federal funds. MIT, *The Federal Government and the Biotechnology Industry: A Successful Partnership* (1995), *available at* http://web.mit.edu/newsoffice/www/BioStudy

.html. The Internet, now an integral part of society, began as a network of computer science departments funded by the National Science Foundation. National Science Foundation, *The Nifty Fifty*, *available at* http://www.nsf.gov/about/history/nifty50/index.jsp (last updated Jan. 27, 2005). The biotechnology revolution, which has spawned most of the medications on which we depend, emerged from pioneering academic research conducted with funds from the National Institutes of Health. Arthur Kornberg, *Support for Basic Biomedical Research: How Scientific Breakthroughs Occur*, in *The Future of Biomedical Research* 38 (Claude E. Barfield & Bruce L.R. Smith eds., Washington, DC: American Enterprise Institute & The Brookings Institution 1997). Federally funded academic research on fiber optics paved the foundation for the modern telecommunications era. National Science Foundation, *supra*. Indeed, the social value of basic research conducted at America's universities is difficult to overstate: secure credit-card transactions, lasers, doppler weather radar, sign language, even the yellow highway barrels that minimize injuries from car collisions—all of these mainstays of daily life, among many others, likely would not exist without it. *See id.*

These innovations have contributed enormously to the national economy. Studies estimate that roughly one-third of the total value of the NASDAQ market stems from federally funded university-based research. Margo Carmichael Lester, *Federal Funding Spurs Private Innovation*, LARTA Vox (Nov. 3, 2003), *available at* http://www.larta.org/lavox/articlelinks/2003/031103_techxfr-government.asp. In the high-technology sector, where federal funding of academic research is most robust, America is the world leader, accounting for about one-third of global production. National Science Board, *Science and Engineering Indicators - 2004*, at 6-8. And because "U.S. high technology industries have been more successful exporting their products than other U.S. industries, [they] play a key role in returning the United States to a more balanced trade position" in a time of growing deficits. *Id.* at 6-11.

Basic research conducted at universities is also critical to military preparedness and national security. Robust federal funding of academic research emerged after World War II as a solution to demands for rapid advances in military technology, and it continues to serve that function in the post-Cold War era. Then-National Security Advisor Condoleezza Rice emphasized this connection less than two months after the terrorist attacks of September 11, 2001:

> The key to maintaining U.S. technological preeminence is to encourage open and collaborative basic research. The linkage between the free exchange of ideas and scientific innovation, prosperity, and U.S. national security is undeniable. This linkage is especially true as our armed forces depend less and less on internal research and development for the innovations they need to maintain the military superiority of the United States.

National Security Advisor Condoleeza Rice, November 1, 2001, letter to Center for Strategic and International Studies Co-Chairman, Dr. Harold Brown, *available at* http://206.151.87.67/docs/CondiRiceLetter.htm.

In addition to expanding public knowledge and driving the development of new technologies, "the deliberate decision to locate most fundamental research in universities rather than in government laboratories or private research institutes [has] had an equally significant benefit. It enable[s] the next generation of scientists and engineers to receive their education and training from the nation's best scientists and engineers, who are required to teach as they pursue [their] own research." Levin, *supra*, at 91. This integration of research and education has been described as "the hallmark and strength" of the nation's innovation system. Nat'l Science & Technology Council, *supra*, at 336. It not only furthers the university's core educational mission, but also benefits society by ensuring a steady stream of highly trained graduates.

Some of those graduates pursue research careers in universities, replenishing the academy with new talent and

ensuring that future students receive the same innovative training. "But the many who enter industrial employment after graduation take with them invaluable assets—state-of-the-art knowledge obtained by working at the frontiers of science, and experience with the most advanced research tools and equipment." Levin, *supra*, at 91. Universities thus generate human capital that is equally important to the nation's prosperity as the intellectual products of basic research. University students trained with federal funds ultimately "make contributions to public health and safety, national security, environmental quality, agricultural productivity, quality of life, and international economic competitiveness." Nat'l Science and Technology Council, *supra*.

All of these benefits further underscore the coercive effect of conditions on federal funding of basic university research. Universities could not reject federal assistance without altering their basic mission and character, and such a rejection would entail the dismantling of a major part of the nation's research and development infrastructure.

III. Academic Freedom Is Equally Critical To Private Universities And To The Health Of Democratic Society

Because research universities depend on federal funding and cannot, as the government contends, simply "decline federal assistance," intrusive funding conditions threaten the vital interest in academic freedom at institutions of higher education. Such institutions foster an atmosphere of free inquiry that is essential to the national welfare. That function would be severely undermined were the government's position to become the law of the land.

The principle of academic freedom reaches deep into this nation's history, and it emerged in unison with the rise of the research university. As one commentator has noted, "[i]t is no coincidence that the concept of the research university and the idea of academic freedom finally developed simultaneously in the same place, for the two are interdependent." Lacovara, *supra*, at 226.

This Court has long acknowledged that academic institutions must be free to define their mission and to operate subject to relatively minimal external constraints. The roots of that principle trace to *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819), which arose at a time when "legislative threats to or attacks on colleges had produced at least stagnation in and often serious injury to the institutions." Bruce A. Campbell, *Dartmouth College as a Civil Liberties Case: The Formation of Constitutional Policy*, 70 Ky. L.J. 643, 693-694 (1982). Rejecting a State's power to alter the charter of Dartmouth College and to bring that institution wholly within legislative control, this Court laid the early foundation for what would become the principle of academic freedom, "encourag[ing] the development of 'private' colleges by protecting them from state interference." Mark D. McGarvie, *Creating Roles for Religion and Philanthropy in a Secular Nation: The Dartmouth College Case and the Design of Civil Society in the Early Republic*, 25 J.C. & U.L. 527, 560, 566 (1999).

In the century following *Dartmouth College*, direct interaction between private universities and the State was rare because such universities "received virtually no state or federal support and were subjected to few governmentally imposed legal duties." J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 Yale L.J. 251, 322 (1989) (footnote omitted). In 1957, however, questions of academic freedom reached the Court in *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957), prompting a majority of Justices squarely to address and embrace that principle. *Sweezy* involved the conviction of an individual who refused to answer the New Hampshire Attorney General's questions regarding lectures he had given at a state university. The Court invalidated the conviction, declaring that "[t]he essentiality of freedom in the community of American universities is almost self-evident." *Id.* at 250 (plurality opinion). "[A]ny strait jacket upon the intellectual leaders in our colleges and universities," the Court continued, "would imperil the future of our Nation." *Id.* "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new

maturity and understanding; otherwise our civilization will stagnate and die." *Id.* Thus, from its first statements on the subject, this Court has recognized the value of academic freedom not only to universities but also to society.

Sweezy also prompted a concurring opinion by Justice Frankfurter, joined by Justice Harlan, which further emphasized the relationship between the nation's welfare and free academic discourse:

> For society's good—if understanding be an essential need of society—inquiries into these problems, speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.

Id. at 262 (Frankfurter, J., concurring in the result). Justice Frankfurter pointedly denounced governmental interference in the intellectual life of the university, noting that a university "ceases to be true to its own nature if it becomes the tool of Church or State," and articulated the oft-quoted "four essential freedoms of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." *Id.* at 262-263 (quoting the statement of open universities in South Africa).

This Court has repeatedly reaffirmed the key rationales underlying *Sweezy*: the importance of academic freedom to the integrity of the university and the benefit to society of maintaining spheres of intellectual inquiry free from state control. In *Keyishian*, 385 U.S. at 603, the Court reiterated that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *See Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."). Such decisions under-

score this Court's long recognition that, in light of "the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter* v. *Bollinger*, 539 U.S. 306, 329 (2003).[4]

Another key thread in this Court's decisions is the need for judicial deference to a university's decisions about how it chooses to advance its academic mission. Thus, in *Regents of the University of Michigan* v. *Ewing*, 474 U.S. 214 (1985), a student challenged the constitutionality of the university's decision to dismiss him from his program of study. This Court held that when such decisions are attacked, the judiciary "should show great respect for the faculty's professional judgment." *Id.* at 225. A court should overturn the decision only if it reflects "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.* The Court has thus established a "tradition of giving a degree of deference to a university's academic decisions." *Grutter*, 539 U.S. at 328; *see id.* ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer.").

The reach of academic freedom in this Court's cases has also extended well beyond the classroom to embrace a university's institutional decisions. "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself." *Ewing*, 474 U.S. at 226 n.12 (citations omitted). The Court has recognized that decisions occurring outside of the classroom can affect the institutional atmosphere of the university, and "[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, ex-

[4] The special status of universities does not, of course, exempt them from generally applicable laws and obligations that do not unduly interfere with academic autonomy. *See University of Pennsylvania* v. *Equal Employment Opportunity Comm'n*, 493 U.S. 182, 199–200 (1990).

periment and creation." *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in the result) (internal quotation marks omitted). Thus, academic freedom is directly implicated by such choices as the criteria a university employs to select its students, *Regents of the University of California* v. *Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) ("The freedom of a university to make its own judgments as to education includes the selection of its student body."); *Grutter*, 539 U.S. at 328–329, the extracurricular activities in which the university permits its students to engage, *Widmar* v. *Vincent*, 454 U.S. 263, 277–279 & n.2 (1981) (Stevens, J. concurring in the judgment), and, *amici* believe, the manner in which the university conducts its on-campus recruiting program. All of these decisions "shape [the university's] educational character and mission" and are thus protected by the principle of academic freedom. Byrne, *supra*, at 316.

At base, this Court's sustained regard for academic freedom stems from a fundamental recognition: government control over academic decisions threatens the nation's commitment to free and open exchange of ideas. The university is "the single institution in American society that exists solely to nurture and pursue the values enshrined in the First Amendment." Lacovara, *supra*, at 232. This atmosphere produces "future leaders of the political order" who have "a critical attitude toward authoritarian dogma and . . . tolerance of dissent." Byrne, *supra*, at 296. The university thus plays an essential role in our national life, one that this Court has been careful to protect.

IV. The Solomon Amendment Is An Unconstitutional Condition On Federal Funding

As explained in Part II, *supra*, a private research university does not have a true "choice" to accept or to decline federal funding for the basic research that, in critical respects, enables its mission and character. Rejection would have grave consequences not only for universities like *amici*, but also for the nation's leadership in science and medicine. Indeed, the government has elsewhere conceded that the effect of the Solomon Amendment is to coerce private uni-

versities to accept federal funding on the prescribed terms. *See Burt* v. *Rumsfeld*, 354 F. Supp. 2d 156, 175 (D. Conn. 2005) ("Here, that issue is not in dispute because [the government] has conceded the fact of coercion."). Accordingly, the unconstitutional conditions doctrine requires this Court to approach and evaluate the Solomon Amendment for what it is—a governmental command. If the government could not issue that command directly, it may not impose it in the form of a condition on funding. *See, e.g., Speiser*, 357 U.S. at 526 (government may not offer a coercive benefit "to produce a result which [it] could not command directly").[5]

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[5] *Amici* do not dispute Congress's power to impose funding conditions that are reasonably related to the purposes of a grant. Thus, Congress might, for example, condition funds for laser research on a university's agreement to complete the project within a specified period, to perform the work using certain technologies, or to provide regular progress reports. In addition, there can be little doubt that the government may impose "cross-cutting" (*i.e.*, non-grant-specific) restrictions on the use of federal funds to ensure that those funds are not used (directly or indirectly) to support discrimination or other disfavored activities. Examples of such conditions include laws mandating gender equality in athletics at federally funded institutions, *see, e.g.*, 20 U.S.C. § 1681; *cf. Grove City Coll.* v. *Bell*, 465 U.S. 555, 575-576 (1984), and provisions of the Internal Revenue Code denying tax-exempt status to private schools with racially discriminatory admissions policies. *See Bob Jones Univ.* v. *United States*, 461 U.S. 574, 604 (1983). Indeed, the Constitution may affirmatively require the government "to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination." *Norwood* v. *Harrison*, 413 U.S. 455, 467 (1973).

Whatever the reach of this authority, however, it does not apply in this context for a number of reasons. First, the government does not, and cannot, contend that the condition imposed by the Solomon Amendment is related in any manner to the vast array of grants and contracts that must be terminated if a university fails to comply. *See Burt* v. *Rumsfeld*, 354 F. Supp. 2d 156, 175 (D. Conn. 2005) (the government "makes no claim, nor could it . . . , that the condition imposed by the Solomon Amendment is in any way related, let alone reasonably, to the purposes for which the federal funds have been given"). Second, in other contexts, the government may have a legitimate (and perhaps compelling) interest in ensuring that federal grants do not directly or indirectly (by freeing up other university dollars) make the government complicit in some offending conduct, such as racial or sex discrimination. Here, however, there is no such activity at

With the issue thus framed, the Solomon Amendment's effect is unmistakable. As this Court has repeatedly recognized, *see supra*, at 16-20, academic freedom is "a special concern of the First Amendment" and is therefore protected in the same manner as other interests central to that provision. *Bakke*, 438 U.S. at 312 (opinion of Powell, J.). And the Solomon Amendment goes far beyond requiring universities to grant the military access to their campuses and students. Specifically, it demands access for military recruiting that is "at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C. § 983. The reach of this "equal access" requirement, at least as construed by the government, is illustrated by the fact that a university would risk losing its federal funding even if it afforded military recruiters access to its campus and students fully adequate to meet the military's recruiting

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issue; the government does not argue that the Solomon Amendment is necessary to ensure that federal funds do not indirectly support some wrongful conduct. Rather, the government simply seeks to use the threat of the loss of hundreds of millions of dollars of federal assistance to coerce research universities to do that which the government cannot directly require. Third, this is not a case in which the "governmental interest . . . outweighs . . . whatever burden denial of" federal funding would place on private research universities or where the government has adopted the least "restrictive means" to achieve its goal. *Bob Jones Univ.*, 461 U.S. at 604 (quoting *Thomas* v. *Review Bd. of the Ind. Employment Sec. Div.*, 450 U.S. 707, 718 (1981)). Indeed, the record is devoid of evidence that the government's equal-access principle has in any way advanced military recruiting. *See FAIR* v. *Rumsfeld*, 390 F.3d 219, 235 (3d Cir. 2004) ("The Government has failed to proffer a shred of evidence that the Solomon Amendment materially enhances its stated goal."). And fourth, unlike the Solomon Amendment, which was specifically amended in order to limit free expression, *see id.* at 227–228 (noting that according to the Department of Defense, the equal-access requirement of the Solomon Amendment was intended to prevent universities from "send[ing] the message" that they disapprove of military policy), generally applicable anti-discrimination conditions such Titles VI and IX are in no way designed to affect speech. *Cf. Roberts* v. *U.S. Jaycees*, 468 U.S. 609, 623–624 (1984) (upholding discrimination ban in part on the ground that it "does not aim at the suppression of speech" and lacks the "purpose of hampering [an] organization's ability to express its views").

needs.[6] Thus, for example, a university that arranged for military recruiters to conduct individual interviews with every interested student, at times and campus locations convenient to the military recruiters, would violate the "equal access" principle if the arrangements differed from those used for other employers.

As the Department of Defense has explained, the object of the Solomon Amendment's "equal access" principle is not simply to ensure that the military has adequate access to campuses, but to prevent universities from "send[ing] [a] message"—presumably to its students—through any sort of differential treatment of the military in the recruiting process. *FAIR*, 390 F.3d at 227–228; *see also Burt*, 354 F. Supp. 2d at 178 n.22. The consequences for academic freedom are stark. Under the "equal access" requirement, a university that chose to host military recruiters in a fully adequate and accessible building across the quadrangle from other recruiters, as a means of expressing the university's opposition to the military's "don't ask, don't tell" policy, would risk losing its federal funding.[7]

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[6] The actual reach of the Solomon Amendment, however, is less clear than the government suggests. The law, for example, applies only to "access to students . . . on campuses," 10 U.S.C. § 983(b)(1), yet the government has sought to apply it to recruiting that occurs off campus, *Burt*, 354 F. Supp. 2d at 172-173. Similarly, the government itself characterizes the Solomon Amendment as imposing an "equal access" rule for military recruiters (U.S. Br. 16), but simultaneously maintains that the law requires preferential treatment for military recruiters on the ground that, unlike all other recruiters, they need not comply with a school's generally-applicable nondiscrimination policy.

[7] The government also incorrectly asserts that "the Solomon Amendment is aimed solely at an institution's *conduct* in denying equal access to military recruiters" and "is entirely indifferent to an institution's reason for denying equal access." U.S. Br. 42 (emphasis in original). To the contrary, Congress has elevated some reasons above others, allowing differential treatment of military recruiters where the institution "has a longstanding policy of pacifism based on historical religious affiliation," 10 U.S.C. § 983(c)(2). The Solomon Amendment is based on the implicit judgment that other reasons are less valid.

Even a university prepared to give the military fully adequate access is thus presented with the untenable choice of either bending to the government's demand that it not "send[] [a] message" critical of military hiring policy or losing potentially hundreds of millions of dollars of federal funding necessary to a broad array of unrelated research and educational initiatives. Such a choice necessarily compromises a university's academic freedom and therefore imperils "a traditional sphere of free expression . . . fundamental to the functioning of our society." *Rust*, 500 U.S. at 200. The government has not established a need for the untenable consequences this choice entails.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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SEPTEMBER 2005